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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

MEDLAB, INC., et al.,

Defendants.

Case No. CV-08-0822-SI

**JOINT CASE MANAGEMENT
STATEMENT**

Date of first filing: February 6, 2008
Trial Date: Not yet set

Pursuant to Fed. R. Civ. P. 26(f), Civil L.R. 16-9, and this Court's Order dated February 6, 2008, counsel for Plaintiff Federal Trade Commission and counsel for Defendants Medlab, Inc., Pinnacle Holdings, Inc. ("Pinnacle"), Metabolic Research Associates, Inc., U.S.A. Health, Inc. ("USA Health"), and L. Scott Holmes ("Defendants") conferred telephonically on April 17, 2008. The parties hereby jointly submit this Case Management Statement.

1. Jurisdiction and Service: This Court has subject matter jurisdiction over this matter pursuant to 15 U.S.C. §§ 45(a), 52, and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345. No issues exist regarding personal jurisdiction. All Defendants waived service of the summons. With respect to venue, Defendants Holmes, USA Health, and Pinnacle deny that venue is proper. The remaining Defendants reserve the right to challenge the propriety of venue.

2. Facts:

Plaintiff's Position: Since 2005, Defendants have sold a weight-loss pill to consumers nationwide. During 2005, 2006, and 2007, Defendants made several false and unsubstantiated representations about their weight-loss pill in print advertisements that appeared in Sunday newspaper supplements, including ones that appeared in the *San Francisco Chronicle*. In those advertisements, Defendants represented that their pill causes users to lose substantial amounts of weight rapidly without dieting or exercising through statements such as "Lose up to 15 pounds a week" with "Absolutely No Diet or Exercise Needed." Moreover, Defendants represented that "Clinical studies prove it." Defendants also represented that their pill causes permanent or long-term weight loss through statements such as "LOSE ALL YOUR UNWANTED WEIGHT AND KEEP IT OFF OR YOUR MONEY BACK." Plaintiff contends that each of these representations is false and unsubstantiated.

This case centers on whether the advertisements contain the representations that Plaintiff alleges and whether those representations are false and unsubstantiated. Through expert testimony, Plaintiff will establish that Defendants' weight-loss pill does not cause rapid, substantial, and permanent weight loss as asserted in Defendants'

1 advertisements. In addition, Plaintiff will show that Defendants lacked competent and
2 reliable scientific evidence to support their claims when the ads were disseminated.

3 **Defendant's Position:** Between 2005 and approximately January 2007,
4 Defendants Medlab, Metabolic and USA had marketed a weight-loss program to consumers.
5 Defendants Holmes and Pinnacle have not marketed the product. Advertising for the weight-
6 loss program claimed that the pill and program helps users to lose weight as follows:
7 Because the dietary supplement helps the user feel less hungry, he/she naturally eats less and
8 thus is able to lose weight without traditional diet and/or exercise, although the weight loss
9 will be enhanced by following a sensible eating and exercise program. The benefits of the pill
10 were clinically tested and found to be as represented. The statements quoted by Plaintiff have
11 been taken out of context from the advertising.

12 Through expert testimony and otherwise, Defendants will demonstrate that the
13 representations were accurate and that Defendants had a reasonable basis for making such
14 statements at the time the advertising was disseminated. Moreover, the products were sold
15 with an unconditional money back guarantee of satisfaction so that any consumer who
16 expressed dissatisfaction was able to obtain a full refund of his or her purchase price.

17 **3. Legal Issues:**

18 **Plaintiff's Position:** Legal issues include:

19 A. Whether the FTC has met its burden of proving that Defendants'
20 advertising was likely to mislead a reasonable consumer in violation of the FTC Act.

21 B. Whether the FTC has met its burden of proving that Defendant Holmes
22 is personally liable for the violations of the FTC Act.

23 C. Whether the Court should order equitable relief in the form of consumer
24 redress, disgorgement, and restitution.

25 D. Whether the FTC has established a basis for a permanent injunctive
26 relief.

27 **Defendant's Position:** Including the burden of proof issues listed by Plaintiff
28 above, there are several additional legal issues to be litigated, including:

1 A. Whether Defendants' actions are privileged and protected commercial
2 speech under the First Amendment to the United States Constitution.

3 B. Whether the regulatory standards governing the quantity and quality of
4 the substantiation that Defendants must possess at the time that they make express or implied
5 claims in advertising are unconstitutionally vague.

6 C. Whether assuming arguendo that Defendants are found to have violated
7 the Act, whether they should be compelled to disgorge more than the profits that they
8 received.

9 **4. Motions:**

10 **Plaintiff's Position:** Plaintiff filed a motion to strike affirmative defenses and
11 jury demand now set for hearing on July 18, 2008. Plaintiff also anticipates filing a motion
12 for summary judgment.

13 **Defendant's Position:** Defendants may file a motion to dismiss the complaint
14 against Defendants Holmes and Pinnacle who have not marketed the product and a motion to
15 dismiss for improper venue as to Defendants Holmes, USA Health and Pinnacle as well as
16 motion and/or counter motion for summary judgment as to all Defendants.

17 **5. Amendment of Pleadings:** The parties propose a deadline for
18 amending pleadings of July 1, 2008.

19 **Plaintiff's Position:** Plaintiff may dismiss Defendants Medlab, Inc., Metabolic
20 Research Associates, and USA Health if Plaintiff confirms during discovery that they have
21 been dissolved, have not been succeeded by other entities, and have no assets.

22 **Defendant's Position:** Defendants do not expect to amend their answer.

23 **6. Evidence Preservation:**

24 **Plaintiff's Position:** All relevant evidence relating to the Defendants has been
25 preserved. Custodians of relevant evidence received a litigation hold prior to the outset of
26 litigation, advising them to preserve any materials relating to Defendants. There have been
27 no ongoing erasures of e-mails, voice mails, and other electronically-recorded material.

28 **Defendant's Position:** Defendants' position is the same. All relevant

1 evidence has been preserved.

2 7. **Disclosures:** The parties have agreed to exchange initial disclosures, as
3 required by Fed. R. Civ. P. 26(a)(1), on or before May 9, 2008.

4 **Plaintiff's Position:** In its initial disclosures, Plaintiff will have identified each
5 individual or entity that Plaintiff contacted during its investigation of Defendants' practices
6 that has discoverable information that Plaintiff may use to support its claims. Plaintiff also
7 will have provided copies of or identified all documents that Plaintiff obtained from those
8 individuals or entities and that Plaintiff may use to support its claims. Plaintiff also may use
9 documents that Defendants provided to Plaintiff during its investigation. Plaintiff will
10 disclose its estimate of consumer injury and state that the Fed. R. Civ. P. 26(a)(1)(A)(iv)
11 disclosure relating to insurance does not apply to Plaintiff.

12 **Defendants' Position:** Defendants intend to provide the information required
13 under F.R.C.P. Rule 26.

14 8. **Discovery:** The parties have requested an early settlement conference
15 before a magistrate. If a settlement conference can be scheduled in the short term,
16 Defendants request holding discovery in abeyance pending the settlement process. If a
17 settlement conference cannot be arranged within 30 days, Defendants agree to begin formal
18 discovery on May 19, 2008. At Defendants' request, Plaintiff did not begin to seek discovery
19 immediately after the mandatory Rule 26(f) conference on April 17, 2008. Plaintiff wishes to
20 begin formal discovery on May 19, 2008, regardless of whether a settlement conference can
21 be arranged within 30 days.

22 The parties jointly propose to the Court the following discovery plan pursuant
23 to Fed. R. Civ. P. 26(f):

24 **Initial Disclosures:** Please see Item 7 above.

25 **Discovery Scope and Schedule:** The parties intend to conduct discovery on
26 all matters relevant to issues raised by the Complaint, Answer, and subsequent pleadings and
27 all matters otherwise within the scope of Fed. R. Civ. P. 26(b)(1).

28 Plaintiff may need to propound discovery on the following subjects: the

1 advertisements and their dissemination; Defendants' substantiation for the weight-loss and
2 weight-loss maintenance claims made in their advertisements; the efficacy of Defendants'
3 weight-loss pill as a weight-loss and weight-loss maintenance product; Mr. Holmes'
4 participation in the alleged acts and practices; whether the corporate defendants acted as a
5 common enterprise; and the extent of consumer injury. Plaintiff also may propound
6 discovery relating to the seriousness and deliberateness of Defendants' acts and practices,
7 which is relevant to the appropriateness of the terms of any permanent injunction that
8 Plaintiff may seek.

9 Defendants may need to propound discovery on issues relating to their
10 affirmative defenses, including the regulatory standards governing the quality and quantity of
11 substantiation that Plaintiff claims must be possessed at the time that express or implied
12 claims are made in advertising for weight-loss products and how such standards have been
13 interpreted by Plaintiff. Defendants may also need to conduct discovery regarding arbitrary
14 enforcement and other cases in which the measure of recovery was found to be less than the
15 disgorgement of gross revenues received. Defendants may need to conduct further discovery
16 regarding each individual or entity the Plaintiff contacted during its investigation and
17 Plaintiff's claim of consumer injury.

18 **Electronically Stored Information:** The parties did not reach an agreement
19 regarding the form or forms in which electronically stored information should be produced.
20 At this junction, however, the parties do not anticipate issues relating to disclosure or
21 discovery of electronically stored information.

22 **Claims of Privilege or of Protection as Trial Preparation Materials:** The
23 parties agree to assert any claims of privilege or of protection as trial-preparation materials by
24 submitting a privilege log that conforms to Fed. R. Civ. P. 26(b)(5)(A). The parties also have
25 agreed that, in the privilege log, the parties may group documents by categories (*i.e.*, author,
26 types of documents, the applicable date range, and grounds for the party's assertion of
27 privilege or protection) if those documents have not been communicated outside of the FTC
28 or have been communicated only between Defendants and their counsel.

1 **Discovery Limitations:** The parties propose limiting expert discovery to not
 2 require drafts of Rule 26 expert reports. The parties do not propose any other limitations or
 3 modifications of the discovery rules.

4 **Other Orders:** The parties plan to file a proposed stipulated protective order
 5 to protect the personally identifiable and private information of individual(s) and any
 6 confidential proprietary and privileged documents relating to the business entities.

7 9. **Class Actions:** Not applicable.

8 10. **Related Cases:** Not applicable.

9 11. **Relief:**

10 **Plaintiff's Position:** Plaintiff seeks a permanent injunction to prevent future
 11 violations of the FTC Act by Defendants. It also seeks \$2,727,516 to redress injury to
 12 consumers resulting from Defendants' violations of the FTC Act. That amount represents
 13 Defendants' estimated gross sales of the product in 2005, 2006, and 2007, less refunds.
 14 Plaintiff bases this estimate on information that Plaintiff obtained from Defendants'
 15 fulfillment house. Plaintiff also seeks the costs of bringing this action.

16 **Defendant's Position:** No injunctive relief is appropriate because the
 17 advertising was discontinued more than a year ago and is not intended to be resumed. If a
 18 violation is found to have occurred, the remedy should be limited to offering to provide a
 19 refund to all dissatisfied purchasers.

20 12. **Settlement and ADR:** The parties have complied with the
 21 requirements of ADR L.R. 3-5, including the filing of the appropriate requests and
 22 certifications with the Court Docket Nos. 15-17. They have filed a joint stipulation
 23 requesting that the Court refer this case to a Magistrate Judge for an early settlement
 24 conference. On May 6, 2008, the Court issued an order assigning the case to Magistrate
 25 Judge Bernard Zimmerman for Voluntary Settlement Conference.

26 13. **Consent to Magistrate Judge For All Purposes:** The parties have not
 27 stipulated to a Magistrate Judge for all purposes – only settlement conference.

28 14. **Other References:** The parties do not believe the case is suitable for

reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

15. **Narrowing of Issues:** The parties are not aware of any issues that could be narrowed by agreement.

16. **Expedited Schedule:** The parties do not believe this case can be handled on an expedited basis.

17. **Scheduling:** The parties suggest the following schedule for future proceedings assuming a settlement conference cannot be arranged within 30 days:

Trial	April 1, 2009
Pre-Trial Conference	March 12, 2009
Last day for hearing dispositive motions	January 30, 2009
Last day for filing dispositive motions	November 27, 2008
Discovery Cutoff	November 7, 2008
Rebuttal Expert Witness Depositions Completed	November 7, 2008
Rebuttal Expert Witness Disclosures	October 3, 2008
Affirmative Expert Witness Depositions Completed	September 12, 2008
Affirmative Expert Witness Disclosures	August 4, 2008
Deadline for Amending Pleadings	July 1, 2008
Discovery Begins	May 19, 2008
Answer Filed	April 4, 2008

18. **Trial:**

Plaintiff's Position: Plaintiff requests a bench trial and estimates that the trial will last four days.

Defendants' Position: Defendants request a jury trial and estimate that the trial will last four days.

19. **Disclosure of Non-party Interested Entities or Persons:**

Plaintiff's Position: Civil Local Rule 3-16 does not apply to Plaintiff, as a

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1 government agency.

2 **Defendants' Position:** Defendants have filed the "Certification of Interested
3 Entities or Persons" required by Civil Local Rule 3-16. The undersigned certifies that as of
4 this date, other than the named parties, there is no such interest to report.

5 **20. Such other matters as may facilitate the just, speedy, and**
6 **inexpensive disposition of this matter:**

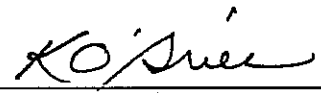
7 **A. Service of Court Filings:** In addition to the Court's electronic filing
8 system, the parties agree to serve such papers by email and, if the document exceeds 30
9 pages, by first class or overnight mail.

10 **B. Service of Discovery Requests on the Parties:** The parties agree to
11 email such requests to the receiving party in a word processing format, such as Word or
12 WordPerfect.

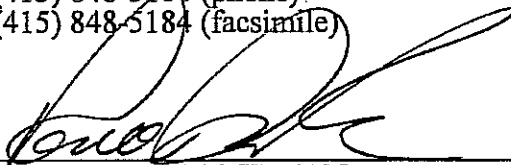
13 Other than as addressed above, the parties are not aware of any other matters as
14 may facilitate the just, speedy, and inexpensive disposition of this matter.

15 Respectfully submitted,

16
17 DATED: 5/8, 2008


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24 DATED: 5/7, 2008


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